JAMES TAN

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[CRIMINAL APPEAL NO. 3 OF 1984]
19 JUNE 1985

CRIMINAL LAW AND PROCEDURE: *Corruption - Cheating - Amended charge - Appeal against conviction and sentence.*

The appellant was charged in the Magistrate's Court under s. 3(a)(iii), Prevention of Corruption Act 42/61, Laws of Malaysia, Act No. 57. The learned Magistrate found that the prosecution had failed to establish a *prima facie* case against the appellant for the offence charged but held the facts to be more consistent with the offence of cheating and acquitted the appellant. On appeal Ho J directed the learned Magistrate to amend the charge to one of cheating and to proceed on the amended charge.

After hearing the defence, the learned Magistrate found the appellant guilty on the amended charge and sentenced the appellant to 18 months' imprisonment and in addition a fine of RM3,000 or one year's jail in default.

The appellant appealed against conviction and sentence on two main grounds: firstly, that the learned Magistrate erred in law in calling for the appellant to make his defence on the amended charge under s. 420 of the Penal Code and secondly and in the alternative that the trial Magistrate had not adequately considered the appellant's defence.

Held:

[1] The learned Magistrate did not err in law in calling for the appellant's defence because before it can amount to an offence of cheating there must be a deception practised and in this case there was a *prima facie* case of obtaining by deception not rebutted by the appellant.

[2] The appellant's defence did not throw any doubt on the prosecution's case.

[3] The appeal was dismissed, and the conviction and sentence were confirmed.

Cases referred to:
PP v. James Tan [1983] 2 MLJ 173
Tan Peng Ann v. PP [1949] MLJ Supp 10

Legislation referred to:
Penal Code, s. 420
Prevention of Corruption Act 42/61, s. 3(a)(iii)

For the appellant - C.I. Robertson; M/s. Skinner Lind Robertson Pang & Co.
For the public prosecutor - Abdul Malik bin Hj. Ishak; SFC

JUDGMENT

Abu Mansor Ali J:

The appellant in this appeal was first charged on the 6 April 1981 for an alleged offence of corruptly receiving gratification of cash cheque valued RM112,800 from complainant, Cheung Chi Han, on 23 January 1981 on account of the Director of Income Tax, Sabah, and his officers to facilitate in obtaining a reduced assessment of real property gains tax in respect of sale of Lok Kawi Estate, an offence punishable under s. 3(a)(iii), Prevention of Corruption Act 42/61, Laws of Malaysia, Act No. 57.

After the close of prosecution case and at an adjourned hearing on 15 January 1982, the learned Magistrate made a finding that the prosecution had failed to establish a *prima facie* case against the appellant for the offence charged but held that the facts to be more consistent with the offence of cheating. The learned Magistrate then acquitted and discharged the appellant without considering an amendment to the charge.

Against the acquittal the learned Deputy Public Prosecutor appealed complaining that the learned Magistrate should have amended the charge. On 10 January 1983 the appeal came before my brother, Ho J (see *PP v. James Tan* [1983] 2 MLJ 173). He held that the Magistrate ought to have amended the charge to one of cheating unless he had good reason not to do so and since no good reason was shown he directed the learned Magistrate to amend the charge to one of cheating and ordered that trial was to proceed on the amended charge with which decision, with respect, I agree entirely.

On 15 August 1983 the appellant appeared again before the learned Magistrate when he was asked to plead to the amended charge of cheating and he claimed trial. After hearing the defence, the learned Magistrate on 11 October 1983 found the appellant guilty on the amended charge and sentenced the appellant to 18 months' imprisonment and in addition to a fine of RM3,000 or one year's jail in default. Against this conviction and sentence the appellant now appealed.

The appellant's appeal came before me on the 15 May 1985. He appealed on a number of grounds but at the hearing counsel for appellant concentrated only on two main grounds which were firstly, the learned Magistrate erred in law in calling for appellant to make his defence on the amended charge under s. 420 Penal Code and secondly, if the Appellate Court was not with him on that first ground then the appellant said his defence had not been adequately considered by the trial Magistrate.

On the first point that the learned Magistrate erred in calling for the defence on the amended charge the Court find the appeal was without merit. The learned Magistrate was appreciative of the ingredients required to prove an offence of cheating. Before it can amount to an offence of cheating there must be deception practised. Precisely as found by the learned Magistrate the appellant represented to complainant he was in a position to solve his income-tax problem relating to the Lok Kawi Investment Ltd., in which complainant had interest as he alleged the head of the Income Tax department, Sabah, was his friend. This was in January 1981. Then on 23 January 1981 the appellant pursued the matter and requested complainant to give him a cheque to help complainant to pay partly his income-tax and partly to pay the income-tax head and his subordinates. As a result, the complainant issued a cheque to appellant for RM112,800. The complainant having had second thoughts on the propriety of the whole matter on 23 January 1981 night, stopped its payment the next day.

On 24 January 1981 appellant came and scolded complainant and asked him to issue another cheque as he had already shown, he said, that cheque to income-tax officers and they were waiting for him to cash the cheque (P10) for the same amount. On the butt of the cheque complainant noted to whom it was given and the purpose of the payment.

What transpired after this was on 27 January 1981 appellant handed the complainant a tax requisition for RM70,020. Without saying anything he took the document to be read by his daughter who could read English and his daughter told him he had to pay according to that demand of the income-tax.

Complainant reacted in the way any reasonable person should have and on 28 January 1981 complainant went to look for appellant and not finding him left a message that he was looking for him. He also left the demand letters from income-tax department with appellant's assistant. The appellant did come to see complainant thereafter and he gave back the documents demanding the tax from the department. When complainant demanded for an explanation from appellant as his understanding was that part of the RM112,800 in the cheque was for the payment of the tax, the complainant was scolded by the appellant instead of giving an explanation.

On the same day complainant went to Income Tax department with the two documents. He was told to see an officer, Mr. Vincent Chok. He told Vincent Chok the demand had already been paid to which Vincent Chok denied. He was then brought to see Mr. Chong, the Department's head, who told complainant they have not received the payment of RM70,020. It must have been clear to complainant that he had been taken for a ride. Complainant was then told to look for the appellant as obviously he had been had.

It was clear therefore that the learned Magistrate was right in holding there was a *prima facie* case and if unrebutted would warrant a conviction for cheating as clearly there was obtaining by deception and it was false. (see *Tan Peng Ann v. PP* [1949] MLJ Supp 10). We concur with that finding.

As regards the second ground of appeal that the learned Magistrate had not adequately considered the defence after hearing the appellant and prosecution, I also came to the conclusion that this ground too lacked merit.

The gist of the appellant's defence, which was disbelieved by the learned Magistrate, was that through a system of sharing of the compensation money for the Lok Kawi Estate the appellant alleged that the complainant agreed to an arrangement whereby appellant's share was RM112,882.66, rounded up to RM112,800, after including the valuation fees which appellant was supposed to settle. The learned Magistrate considered the defence whether the defence story could reasonably be true. He held it could not be since if that was so then apart from paying RM112,800 to appellant complainant would have to pay for the tax which was yet to be assessed which eventually came to be RM70,020. As the story could not reasonably be true the learned Magistrate did not believe it. Indeed if the arrangement was as described by the appellant the complainant would not have reacted in the way he did by confronting the appellant as to the falsity of his former representation that the RM112,800 was meant to discharge the tax plus some payment to tax officers. He went further than that and complained right up to the head of the Tax department to see whether there was any truth in what had been represented to him by the appellant. We agree with the conclusion of the learned Magistrate that it cannot be true. The learned Magistrate then applied the next test which is if the learned Magistrate did not believe the defence story did

it cast a doubt on the truth of the prosecution's case. The learned Magistrate answered it in the negative and he convicted the appellant and we agree that the defence story has not thrown any doubt in the prosecution's case.

The Court confirmed the learned Magistrate's conviction and sentence and dismissed the appeal. As to sentence in view of the fact that the appellant had been in and out of Court, the Court felt there was no justification for interfering with the sentence as the Court felt the appellant had been punished enough. In passing and not to put too much stress on it that if the charge had been amended by the learned Magistrate in the first instance as he was clearly under a duty to do then probably appellant's trial leading up to his conviction and the dismissal of his appeal would not have taken this long period of time. All in all, the Court felt the sentence as imposed did reflect the seriousness of the offence and there the matter must rest.

Also found at [1986] 2 CLJ 163